FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

and

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

BRIEF FOR RESPONDENTS.

WESTCHESTER LEGAL SERVICES, Inc.
Attorneys for Respondents
171 East Post Road
White Plains, N. Y. 10601
(914) 949-4797

MARTIN A. SCHWARTZ
LAWRENCE S. KAHN
Of Counsel

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WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, Inc. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

BRIEF FOR RESPONDENTS.

Question Presented.

Whether the warehouseman's sale of bailed goods pursuant to New York Uniform Commercial Code, §7-210 constitutes state action on the grounds that New York has delegated the governmental functions of lien enforcement and binding, non-consensual dispute resolution to warehousemen, and that New York has specifically authorized and encouraged warehousemen to perform acts which, if performed by the State, would violate the Fourteenth Amendment?

Statement of the Case.

A. Preliminary Statement.

This action was commenced as a class action pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure. The complaint seeks injunctive and declaratory relief and damages pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3). The complaint challenges the constitutionality of New York Uniform Commercial Code, §§ 7-209 and 210. Section 7-209 authorizes warehousemen to impose a lien by detaining bailed goods indefinitely without providing the owner of the goods with an opportunity for a hearing at any time. Section 7-210 authorizes warehousemen to enforce these liens by selling the goods without ever providing the owner of the goods with an opportunity for a hearing. The issue before the Court is whether the warehouseman's enforcement of this lien pursuant to Section 7-210 constitutes state action within the meaning of the Fourteenth Amendment and conduct "under color of" state law under 42 U.S.C. §1983.

B. Statement of Facts.*

1. *Plaintiff Brooks*

Plaintiff Shirley Herriott Brooks is a widow who resides with her three minor children (A. 9a, 75a). She has been employed as a nurse's aide and as a homemaker, earning approximately $100 per week. (A. 9a, 75a).

In June, 1973, an order of eviction was entered against Mrs. Brooks in the City Court of Mount Vernon. (A. 10a, 75a). On June 13, 1973, the City Marshal removed plaintiff's possessions from her apartment. Mrs. Brooks told the City Marshal that she wanted to call someone to store her household goods. He informed her that she could not contact anyone, and that defendant Henry Flagg, President of defendant Flagg Brothers, Inc., who had accompanied the City Marshal to plaintiff's residence, was the person who would store her goods. (A. 10a, 75a).**

Defendant Flagg informed plaintiff that she would have to pay $65 per month to move and store her furniture. (A. 11a, 75a). Believing she had no other choice, she told Mr. Flagg to proceed with the moving and storage of her furniture and household possessions. (A. 11a, 75a).

After the goods were loaded onto one of Flagg Brothers' trucks, a moving man told Mrs. Brooks that she would

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*Since the case is before the Court for review of the Court of Appeals' reversal of the district court's order granting defendants' motion to dismiss the complaint, the allegations of the complaint must be accepted as true. *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974); *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957).

**A claim against the City Marshal pursuant to 42 U.S.C. §§ 1983 and 1985 was dismissed without prejudice by agreement of the parties.

have to pay $75 per month for storage, $75 for barrelling and platforming and $28 for fumigating, for a total of $178 (A. 11a, 75a). Plaintiff protested that she had been told that $65 would be the entire cost, but again believing she had no choice, paid defendant Flagg $178. (A. 11a, 75a).

On June 15, 1973, Mrs. Brooks called defendant Flagg Brothers in order to find out how long it would store her goods for the $178 payment. (A. 11a, 75a). She was informed by an employee of Flagg Brothers that she owed defendants an additional $156. (A. 11a, 76a). On June 19, 1973, she was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" which showed that Flagg Brothers regarded the $178 as a "deposit" and that Flagg claimed a balance due of $156. (A. 11a, 18a-19a, 76a).* When plaintiff told defendant Flagg that his prices were unreasonable, she was informed that on July 1, 1973 she would owe an additional $75 for storage for the month of July. (A. 11a-12a, 76a). When plaintiff stated that her one month's storage payment of June 13, 1973 should run to July 13, 1973, defendant

*Plaintiff did not sign the bill of lading (A. 18a). In any event, the bill of lading and freight bill provided for a right of sale of non-perishable property only where the "property which has been transported to destination . . . is refused by consignee or party entitled to receive it upon tender of delivery or [where] said consignee or party . . . fails to receive it or claim within 15 days after notice of arrival of the property at destination. . . ." Bill of Lading and Freight Bill §4(b) (A. 19a). The provision manifestly had no application to the transactions between plaintiff and defendants since there was no refusal or failure by plaintiff to receive goods upon a tender of delivery at destination. The court below held that since plaintiff was not given this form until six days after defendant moved and stored her goods, and since the clause appears in minute print on a form provided by Flagg, she was not bound by the clause (A. 165a, n. 3). See *Fuentes v. Shevin*, 407 U. S. 67, 94-96 (1972).

Flagg informed her that storage charges were incurred on a "per month" basis, and that even if her goods had been stored on June 29, 1973, an additional $75 would be due by July 1, 1973. (A. 12a, 76a).*

On June 29, 1973, defendant Flagg informed plaintiff that she could have her goods if she paid the balance of the original bill, $156, plus $45. (A. 12a, 76a-77a). Plaintiff, however, was not able at that time to remove her goods from the warehouse. (A. 12a, 77a).

In early July, 1973, defendant Flagg's secretary informed plaintiff that she could remove her goods on August 14, 1973 only if she paid $484 in cash. (A. 12a, 77a). On August 25, 1973, plaintiff received a letter from defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be kept up or your furniture will be sold. Your previous bal. from
>
> | | |
> |---|---|
> | Moving due | 156.00 |
> | Storage for 7/73 & 8/73 | 150.00 at $75 a month |
> | Total due | 306.00" |
>
> (A. 12a-13a, 20a, 77a).

Accompanying this letter from defendant Flagg Brothers was a "Final Notice", dated August 22, 1973, informing plaintiff that $150 in storage costs was due and that "[u]nless such payment is made we will be obliged to

*Defendants' Statement Pursuant to Rule 9(g) of the Civil Rules of the Southern District of New York sets forth as disputed factual issues whether a valid contract existed between the parties, the rates agreed upon, and the reasonableness of the charges (A. 202-203).

advertise your goods for sale at public auction." (A. 13a, 20a-21a, 77a-78a). This notice was set forth in an official form labeled "Final Notice", *see* A. 116a.

Plaintiff and her attorney wrote to defendant contesting the reasonableness of the rates and the fact that they were repeatedly changing. (A. 13a, 20a-21a, 78a). Defendant Flagg's letter in response stated that plaintiff owed Flagg Brothers $482 and that "[h]er storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." (A. 13a, 24a-25a, 78a).

During this period, all of plaintiff's furniture and household goods were in defendant's warehouse. (13a-14a, 27a, 28a). The family had to sleep on the floor on the one remaining mattress they had, and had to get by without most of their clothes. (A. 13a, 78a-79a). Plaintiff missed a month and a half of work because her nurses uniforms were held by Flagg Brothers. (A. 78a).

Faced with the threatened sale of all of her goods, plaintiff instituted this action on September 21, 1973 for injunctive and declaratory relief and damages, claiming that Flagg Brothers' detention and threatened sale of her goods pursuant to New York Uniform Commercial Code, §§ 7-209 and 7-210 violate the Due Process Clause of the Fourteenth Amendment. (A. 14a-15a). On January 24, 1974, defendant voluntarily returned all of the stored goods to Mrs. Brooks. (A. 79a).

2. *Plaintiff-Intervenor Jones*

At the time Gloria Jones moved to intervene in the district court, her sole source of income was her net wages of approximately $87 per week. (A. 44a). By the time she moved for summary judgment, she was a recipient

of public assistance. (A. 80a). She resided in Mount Vernon, New York. (A. 44a, 80a).

In the fall of 1973, a judgment of eviction was entered against her by the City Court of Mount Vernon, and a warrant of eviction was issued. (A. 45a, 80a). On November 26, 1973, the City Marshal came to remove plaintiff's possessions from her apartment. (A. 45a, 80a). As with plaintiff Brooks, the City Marshal informed Mrs. Jones that she could only store her goods with defendant Flagg Brothers. (A. 45a, 81a). Employees of defendant Flagg Brothers then proceeded to load Mrs. Jones' goods and move them to a Flagg Brothers' warehouse without her authorization. (A. 45a, 81a). Plaintiff was not advised of the rate of storage. (A. 45a, 81a).

In March, 1974, plaintiff was informed by an employee of Flagg Brothers that she would have to pay $600 to acquire her household goods. (A. 46a, 81a). She was further informed that if she had not contacted Flagg Brothers at that time, her goods would have been sold. (A. 46a, 81a).

When plaintiff complained that defendant's rates were unreasonable and that she had not agreed to pay Flagg Brothers any sum for the storage of her goods, she was informed by an employee of defendant Flagg Brothers that she actually owed only $500, and that if she arranged to move her goods from the warehouse by her own means, the amount due would be reduced to $335. (A. 46a, 50a, 81a-82a). This employee also informed plaintiff that if she were unable to pay the bill by April 12, 1974, her goods would be sold. (A. 46a, 82a).

During this period, plaintiff was forced to reside without most of her household goods, clothing and other pos-

sessions. (A. 46a-47a, 50a-51a, 82a-83a). As a result, she was deprived of the companionship of her friends in her home, had to purchase fabric to make replacement clothing and suffered a nervous breakdown (A. 82a-83a).*

Faced with the threatened sale of her goods, plaintiff moved to intervene as a party plaintiff on April 11, 1974. (A. 40a-41a). In response to Mrs. Jones' motion to intervene as a plaintiff, defendants admitted that they had threatened to sell her goods, but stated that they had no present intention of selling the goods, "and if defendants do so decide, I will inform [Mrs. Jones' counsel] well in advance of any sale." (A. 66a).

Mrs. Jones' counsel subsequently received a letter dated May 21, 1974 from defendant's counsel stating:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1, through May 31 at the rate of $75.00 a month plus $35 *auctioneer's fees* or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for storage beyond one month.
>
> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot." (A. 85a-86a). (Emphasis added.)

By decision and order dated June 25, 1974, Mrs. Jones was granted leave to intervene as a party plaintiff. *Brooks*

*Defendants' Rule 9(g) statement sets forth as disputed factual issues whether a valid contract exists between the parties, the rates of storage and the reasonableness of the rates (A. 118a).

v. Flagg Brothers, Inc., 63 F.R.D. 409 (S.D.N.Y.).* Subsequent efforts by counsel to resolve the dispute between the parties failed. (A. 83a-84a, 86a-88a). By letter dated June 28, 1974, Flagg's counsel informed plaintiff's counsel that "Mr. Flagg will take whatever steps he deems necessary to protect his interests." (A. 83a-84a, 88a).

After the district court rendered its decision of July 7, 1975, dismissing the complaint for lack of jurisdiction, Mrs. Jones informed her counsel that she had paid defendant Flagg $1,600 for the return of her goods; that she had not received all of her goods from defendant Flagg; that some of her goods were returned in a damaged condition; and that she had not made the $1,600 payment voluntarily but only because of the threat of sale and the twenty month retention of the goods. (A. 168a n. 7, see also A. 86a-87a).**

Plaintiff Jones died while the appeal from the district court's judgment of dismissal was pending. (A. 168a n. 7). The Court of Appeals granted leave to substitute Jones' personal representative as plaintiff pursuant to

*The district court's decision granting leave to intervene is printed in the petition for certiorari in No. 77-37 at 47a.

**The facts that the parties stipulated to the propriety of the class action, A. 38a-40a, that plaintiff Jones alleges that she did not receive all of her goods, and that she did not pay the $1600 voluntarily but only because of the threat of sale and lengthy detention, defeat the Attorney General's suggestion that the controversy may not be justiciable. See *Brooks v. Flagg Brothers, Inc.*, 63 F.R.D. 409, 413 (S.D.N.Y. 1974). In addition, it should be noted that defendants charged plaintiff Jones an auctioneers' fee, apparently for a scheduled sale pursuant to Section 7-210 (A. 143a, 147a). An action challenging the validity of Section 7-210 on behalf of a person whose goods have been sold is pending in the Southern District of New York. *Svendsen v. Smith's Moving and Trucking Co.*, S.D.N.Y., 77 Civ. 2863 H.F.W. See page 12, n., *infra*.

Fed.R.Civ.P. 25(a). (A. 181a n. 19). Jones' son, Wayne Jones, has since filed an application for Letters of Administration of Gloria Jones' estate in the Surrogate Court of the State of New York, County of Westchester. No. 3906/1977.

C. Proceedings Below.

The action was commenced on September 21, 1973. (A. 1a, A.6a-A.27a).

In February, 1974, the parties stipulated to the propriety of the plaintiff and defendant class actions. (A.38a-40a). By decision dated June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as a party plaintiff. The Attorney General of the State of New York was permitted on consent to intervene as a party defendant to defend the constitutionality of the contested provisions. *N.Y. Executive Law,* §71. The American Warehousemen's Association, the International Association of Refrigerated Warehouses, the Warehousemen's Association of the Port of New York, and the Cold Storage Warehousemen's Association of the Port of New York were also permitted to intervene as party defendants. *Brooks v. Flagg Brothers, Inc.,* 63 F.R.D. 409 (S.D.N.Y. 1974).

By notice of motion, dated August 26, 1974, plaintiffs moved for a class action determination and for summary judgment. (A.72-74a). By notice of motion dated September 19, 1974, defendant Flagg Brothers, Inc. and Henry Flagg cross moved to dismiss the action for failure to state a claim upon which relief can be granted. (A.97a).

By decision and order, dated July 7, 1975, District Judge Werker denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the com-

plaint "for lack of jurisdiction." *Brooks v. Flagg Brothers Inc.,* 404 F.Supp. 1059, 1061 (S.D.N.Y. 1975) (A.141a-157a). The court held that in enforcing the warehouseman's lien, the warehouseman does not act under color of state law within the meaning of 42 U.S.C. §1983 and the Due Process Clause of the Fourteenth Amendment.

On April 7, 1977, the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case to the District Court to resolve the due process claim and to determine the scope of the classes. *Brooks v. Flagg Brothers Inc.,* 553 F.2d 764 (2d Cir. 1977) (A.159a).*

The Second Circuit found state action present in the warehouseman's enforcement of the lien pursuant to section 7-210 of the Uniform Commercial Code. The Court determined that state action was present because New York, by its enactment of section 7-210, delegated to warehousemen "a portion of its sovereign monoply power over binding conflict resolution" and also, the power to "execute a lien and thus perform a function which has traditionally been that of the sheriff." 553 F.2d at 771. (174a-177a). This delegation substantially enhanced the warehouseman's remedies beyond those he possessed at common law, where he had merely the power to retain but not the power to sell goods stored by a bailor. 553 F.2d at 771-772. (A.176a). The court concluded:

> "The action of the state in granting the warehouseman the privileged position he enjoys under §7-210,

*In their Brief for Appellants, p. 45, n., and again at oral argument, plaintiffs' counsel represented to the court below that plaintiffs have no objection to a modification of the scope of the class so as to include only persons engaged in consumer transactions. Plaintiffs agree with the court below that the due process requirements may be different in commercial transactions than in consumer transactions (A. 181a).

> even though long ago, drastically changes the balance of power between debtor and creditor. It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment, it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action." 553 F.2d at 772 (A.176a-177a).

Judge Holden, dissenting, concluded that state action was not present because section 7-210 does not "command" the sale of goods, and because the statutory authorization allowing warehousemen to sell has existed since 1879. 553 F.2d at 775-777. (A.182a-184a).

The Court of Appeals granted defendants' motion to stay its mandate remanding the action to the district court pending proceedings in the Supreme Court. *Fed.R.App. P.*, 41(b).*

Summary of Argument.

This Court has held in *North Georgia Finishing, Inc. v. Di Chem, Inc.*, 419 U.S. 601 (1975), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), that no state may deprive a person of property without affording the owner an opportunity for a hearing. The mere fact that New York has not required "minor governmental functionaries", *Parks v. "Mr. Ford"*, 556 F.2d 132, 148 (3d Cir. 1977) (*en banc*) (Judge Adams, concurring), to be involved in the sale of goods by a warehouseman pursuant to section 7-210 of the Uniform Commerical Code should not deprive the owner of the bailed goods of the procedural safeguards this Court has sought to guarantee in *North Georgia Finishing, Inc., Mitchell, Fuentes* and *Sniadach*.

*On June 13, 1977, plaintiffs' counsel filed an action on behalf of Dorothy Svendsen, a person whose goods were sold pursuant to the contested statute. *Svendsen v. Smith's Moving and Trucking Co.*, S.D.N.Y., 77 Civ. 2863 H.F.W. As in the instant case, plaintiff Svendsen challenged the constitutionality of Section 7-210. This action is assigned to the same District Judge as the *Brooks* case. Plaintiff Svendsen did not move to intervene in the *Brooks* action only because of the stay of the Circuit Court's mandate.

New York, by enacting section 7-210 of the Uniform Commercial Code, has delegated to warehousemen the functions of lien enforcement and final, non-consensual dispute resolution, functions that historically and traditionally are governmental in nature. This conclusion is supported by (1) the determination of the highest state courts of New York that "in [New York] the execution of a lien . . . traditionally has been the function of the Sheriff", *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 20 (1973); *Sharrock v. Dell Buick-Cadillac*, 56 A.D. 2d 446 (2d Dept. 1977); (2) the great weight of lower court authority throughout the country holding lien enforcement to be a public function, *see, e.g., Parks v. "Mr. Ford"*, 556 F. 2d 132 (3d Cir. 1977) (*en banc*); *Cox Bakeries of North Dakota, Inc. v. Timm Moving and Storage Inc.*, 554 F.2d 356 (8th Cir. 1977) (Mr. Justice Clark); *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975); *Hall v. Garson*, 430 F. 2d 430 (5th Cir. 1970); *Caesar v. Kiser*, 387 F.Supp. 645 (M.D.N.C. 1975); *Adams v. Department of Motor Vehicles*, 113 Cal.Rptr. 145, 11 Cal. 3d 146, 520 P.2d 961 (Cal. Sup.Ct. 1974); (3) the fact that at common law the enforcement of the lien was accomplished by a sale of the bailed property by the sheriff, Brown, *Personal Property*,

§121, pp. 602-603 (2d edition 1955); and (4) the fact that one of the most fundamental obligations of sovereignty is its duty to protect property by the judicial resolution of disputes. *See Boddie v. Connecticut,* 401 U.S. 371, 375 (1971); *Parks v. "Mr. Ford",* 556 F.2d 132 (3d Cir. 1977) (*en banc*); *Shirley v. State National Bank,* 493 F.2d 739, 747 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974) (Kaufman, J., dissenting).

Because New York has delegated to warehousemen functions traditionally and historically associated with sovereignty, state action is present in the performance of those functions. *Evans v. Newton,* 382 U.S. 296 (1966); *Terry v. Adams,* 345 U.S. 461 (1953); *Marsh v. Alabama,* 326 U.S. 501 (1946); *Nixon v. Condon,* 286 U.S. 73 (1932).

Without the sanction of section 7-210, warehousemen would not possess the extraordinary power to sell summarily another person's property. At common law, while the warehouseman had a possessory lien on the bailed goods, he did not have the right to sell the goods. Brown, *Personal Property,* §13.1, p. 394 (3d edition, 1955). To enforce a claim against the bailor, the warehouseman's remedy was "suing his debtor for the amount of the claim, and levying execution or attachment on the bailed goods." Brown, *Personal Property,* §121, pp. 602-603 (2d edition 1955). New York, by obviating the need for the warehouseman to bring an action, prove his claim, and obtain and enforce a judgment, has authorized, sanctioned and "encouraged" him to deprive the bailor of his property without a hearing, *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Robinson v. Florida,* 378 U.S. 153 (1964), and has thereby become significantly involved in the contested activity.

This Court's decisions hold that state action is present where, as here, a statute specifically authorizes and encourages, even though it does not command, private individuals to perform acts which otherwise would be unlawful, and which the state itself could not perform consistent with the Fourteenth Amendment. *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Evans v. Newton,* 382 U.S. 296, 305-311 (1966) (White, J., concurring); *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 726 (1961) (Stewart, J., concurring); *id.* at 727 (Frankfurter, J., dissenting); *id.* at 728 (Harlan and Whittaker, JJ., dissenting); *Public Utilities Commission v. Pollak,* 343 U.S. 451 (1952); *Nixon v. Condon,* 286 U.S. 73, 85 (1932); *McCabe v. Atchison,* 235 U.S. 151 (1914). *See also Civil Rights Cases,* 109 U.S. 3 (1883).

I.

The warehouseman's summary sale of a bailor's goods constitutes state action because New York has delegated to warehousemen the governmental functions of lien enforcement and non-consensual dispute resolution and has specifically encouraged, authorized and sanctioned summary sales.

The contested statute authorizes a warehouseman to sell a person's goods and possessions as a means of enforcing his possessory lien for transportation and storage charges allegedly owed. *N.Y. Uniform Commercial Code,* §7-210. The warehouseman's exercise of his statutory authority thus works a final and complete taking of a person's property. The statute does not, however, require that the owner of the goods be afforded an opportunity for a hearing prior to the sale of his goods or at any time thereafter. Nor does the statute even require the warehouseman ever to institute an action on his claim. The contested statute delegates to warhousemen the power to determine *ex parte* the owner's liability for storage and transportation fees, and to enforce that determination by

the summary sale of the goods. As the fact patterns of the named plaintiffs show, the contested statute creates enormous potential for egregious abuse.

There is no question that a sale of a person's property carried out with the assistance of "minor governmental functionaries" performing purely ministerial tasks, *Parks v. "Mr. Ford"*, 556 F.2d 132, 148 (3d Cir. 1977) (*en banc*) (Adams, J., concurring), constitutes a final, complete and drastic taking of property within the meaning of the Due Process Clause. Under these circumstances, it is clear that due process guarantees that the owner of the goods be afforded an opportunity for a hearing prior to sale. *North Georgia Finishing, Inc. v. Di Chem Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In the instant case, the State has delegated to the warehousemen the power to deprive a person of property without an opportunity for a hearing.* The mere fact that New York, unlike the states in *Sniadach, Fuentes* and *North Georgia Finishing, Inc.*, has not required warehousemen to enlist "minor government functionaries to perform ministerial acts . . ." to assist the warehouseman in his "taking", should not cause "divergent conclusions as to the presence, *vel non*, of state action, particularly because the similarities are more significant." *Parks v. "Mr. Ford", supra*, at 148 (Adams, J., concurring).

In *Mitchell v. W.T. Grant Co., supra*, this Court, in upholding the constitutionality of the Louisiana sequestra-

*The taking in the instant case is greater, and the procedural protections less, than in *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing, Inc.* See *Parks v. "Mr. Ford"*, 556 F. 2d 132, 142-143 (3d Cir. 1977) (*en banc*); *Hernandez v. European Auto Collision, Inc.*, 487 F. 2d 378, 385 (2d Cir. 1973) (Timbers and Lumbard, JJ., concurring).

tion statute, relied on the statutory requirement that the creditor present the relevant facts to an impartial judge. "Mitchell was not at the unsupervised mercy of the creditor and court functionaries." *Id.* at 616. In contrast, a a person who stores goods in a warehouse is unquestionably at the "unsupervised mercy of the warehousemen" because of the warehousemen's power of summary sale under section 7-210. Since state control was essential to the conclusion that the statute in *Mitchell* conformed to due process requirements, New York's total abdication of that control in the instant case should not serve to insulate totally section 7-210 from the Due Process Clause.

The State's delegation of the traditional governmental functions of lien enforcement and binding non-consensual dispute resolution, together with the State's specific statutory authorization which allows warehousemen to conduct summary sales, supports the decision of the court below that the state is significantly involved in the contested activity. *Accord, Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977) (*en banc*)*; *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356 (8th Cir. 1977) (Mr. Justice Clark); *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975); *Hall v. Garson*, 430

*Every one of the nine judges of the Third Circuit Court of Appeals in *Parks v. "Mr. Ford"*, 556 F. 2d 132 (3d Cir. 1977) (*en banc*) was in agreement as to the presence of state action with respect to the sale provision of the Pennsylvania garageman's lien law. The Pennsylvania statute is virtually identical to the contested statute herein. Not one of the several defendants has even cited *Parks*, much less attempted to distinguish it or show that it was wrongly decided. Defendants rely upon *Melara v. Kennedy*, 541 F. 2d 802 (9th Cir. 1976). *Melara* is distinguishable in that it involved a contractual power of sale. *Id.* at 807. As is discussed more fully *infra*, there is neither a contractual nor common law power of sale in the instant case. The power of sale derives *solely* from the contested statute.

F.2d 430 (5th Cir. 1970); *Caesar v. Kiser,* 387 F.Supp. 645 (M.D.N.C. 1975); *Cockerel v. Caldwell,* 378 F.Supp. 491 (W.D.Ky. 1974) (three-judge court); *Adams v. Department of Motor Vehicles,* 113 Cal.Rptr. 145, 11 Cal. 3d 146, 520 P.2d 961 (Cal.Sup.Ct. 1974); *Blye v. Globe-Wernicke Realty Co.,* 33 N.Y.2d 15 (1973).

The court below applied the test set forth in this Court's decision in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974), that is, "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (171a). This test was set forth in *Jackson* in the context of a claimed violation of procedural due process—the same claim asserted in the instant case. Since the court below employed the proper state action standard, the essential question concerns the application of this standard to the instant case.

This is not a case like *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) or *Jackson v. Metropolitan Edison Co., supra,* where the state involvement with the private entity was peripheral, tangential and unrelated to the contested activity. Here, the State, in authorizing warehousemen to sell bailors' goods, has specifically delegated to warehousemen the governmental functions of lien enforcement and binding, final, nonconsensual dispute resolution. There is thus a direct, significant and precise nexus between the State action and the contested activity.

This Court has consistently held that state action is present when the state delegates a function which is traditionally and historically associated with sovereignty. *Evans v. Newton,* 382 U.S. 296 (1966); *Griffin v. Maryland,* 378 U.S. 130 (1964); *Terry v. Adams,* 345 U.S. 461 (1953); *Marsh v. Alabama,* 326 U.S. 501 (1946); *Smith v.*

Allwright, 321 U.S. 649 (1944); *Nixon v. Condon,* 286 U.S. 73 (1932). "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton, supra* at 299.

The continued validity of this doctrine was recently reaffirmed by this Court in *Jackson v. Metropolitan Edison Co., supra* at 353, where the Court cited *Evans, Terry, Marsh, and Nixon,* and stated:

> "If we were dealing with the exercise . . . of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."•

It is not, of course, always easy to determine whether a function is governmental or private in nature. In the instant case, however, the conclusion of the court below that the functions involved are governmental in character is supported by an analysis of the following factors: (1) the position of the New York courts with respect to the nature of the function; (2) the conclusion reached by courts throughout the country; (3) the manner in which the function was carried out at common law; and (4) the relationship of the activity to the purposes of government and the values which the Fourteenth Amendment seeks to protect.

•"The underlying rationale of the state function cases is that a state may not delegate to the private sector a substantial degree of control over a traditional governmental function without subjecting the private sector to the requirements of the Fourteenth Amendment." Comment, State Action: A Pathology and A Proposed Cure, 64 Cal. L. Rev. 146, 167 (1976).

This Court has recognized that deference should be given to the determination by the State courts as to whether an activity constitutes a governmental function in that State. *Jackson v. Metropolitan Edison Co., supra* at 353; *Nixon v. Condon, supra* at 97 (McReynolds, J., dissenting). Cf. *Reitman v. Mulkey,* 387 U.S. 369, 374 (1967) ("careful consideration" given to the California Supreme Court's determination of objective, effect and historical context of the contested state constitutional provision); *City of Eastlake v. Forest City Enterprises,* 96 S.Ct. 2358, 2368 (1976) (Stevens, J., dissenting). While the question of state action is, of course, ultimately to be determined by this Court, *Nixon v. Condon,* 286 U.S. 73, 88-89 (1932), the state's highest state court is in the best position to evaluate whether a particular function is a governmental function in that particular state. Thus, in concluding that the furnishing of utility service did not constitute a public funciton, this Court in *Jackson* relied upon the fact that the Pennsylvania courts did not regard the furnishing of utility service to be the function of the State or local government. *Jackson v. Metropolitan Edison, supra* at 353, citing decisions of the Pennsylvania courts.

In sharp contrast to *Jackson,* the highest court in New York has concluded that lien enforcement constitutes a function traditionally and historically carried out by state officials. *Blye v. Globe-Wernicke Realty Co.,* 33 N.Y.2d 15, 347 N.Y.S. 2d 170 (1973); *Sharrock v. Dell Buick Cadillac Corp.,* 56 A.D. 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977); *see also N.Y. Lien Law,* §§ 41, 50, 206-210; *N.Y. RPAPL,* §1351; *N.Y.CPLR,* §§ 5230, 5233-5236, 6211, 6214-6216.

In *Blye v. Globe-Wernicke Realty Co., supra,* the New York Court of Appeals concluded that in New York, lien enforcement historically and traditionally has been the function of the sheriff:

> "In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52), traditionally has been the function of the Sheriff." *Blye v. Globe-Wernicke,* 33 N.Y.2d at 20; 347 N.Y.S.2d at 175.

The Attorney General contends that *Blye* is distinguishable on the ground that while a seizure of goods was involved in that case, the enforcement of the warehouseman's lien does not require a seizure of goods. The Court of Appeals in *Blye,* however, found that the innkeeper carried out a public function not because a seizure was involved, but because *"the execution of a lien . . .* traditionally has been the function of the Sheriff." *Blye v. Globe-Wernicke,* 33 N.Y.2d at 20, 347 N.Y.S.2d at 175. (emphasis added)* It was thus the function of lien enforcement, rather than its particular method, which was critical to the *Blye* court's conclusion that lien enforcement is a function which in New York historically and traditionally has been carried out by the sheriff.

*While a seizure may be necessary to enforce some liens, such as the innkeeper's lien, the New York legislature has recognized that a seizure is not always necessary to enforce a lien. Thus, when plaintiff already has possession of the property, there is no necessity for a seizure and the lien can be enforced by sale alone. See *N. Y. Lien Law,* §208. Cf. *N. Y. Lien Law,* §207 (the sheriff shall seize the chattel prior to sale when it is not in plaintiff's possession). In addition, both mechanic's liens and mortgages on real property may be foreclosed by sale by a sheriff or other public official without any need for seizure. *N. Y. Lien Law,* §41; *N. Y. RPAPL,* §1351. Cf. *Oysterman's Bank and Trust Co. v. Weeks,* 35 A. D. 2d 580, 313 N. Y. S. 2d 535, 537 (2d Dept. 1970) (sheriff need not make formal levy or seizure before foreclosing a judgment lien on real property). Even in those situations where the sheriff must seize the property, he must still also sell the property as a necessary step to enforcing the lien. *N. Y. CPLR,* §§ 5230, 5233, 5234, 5236. The sale by the sheriff is the precise function that the warehouseman performs when he enforces his lien under Section 7-210 of the Uniform Commercial Code.

The highest judicial authority in New York supports the view that lien enforcement is a state function regardless of whether or not a seizure is involved. *Sharrock v. Dell Buick-Cadillac Inc., supra.* The Court in *Sharrock,* concluded that a garageman, who enforces his statutory lien by sale, without seizure, and in the same manner as the warehouseman, "in executing his lien, like the innkeeper is performing the traditional function of the Sheriff. . . ." *Sharrock v. Dell Buick-Cadillac,* 56 A.D. 2d at 455, 393 N.Y.S.2d at 171.*

In addition to the decisions in *Blye* and *Sharrock,* the great weight of authority throughout the country has concluded, like the court below, that the non-consensual sale of a person's property to enforce a lien constitutes a public function. *Parks v. "Mr. Ford",* 556 F.2d 132 (3d Cir. 1977) (*en banc*) (enforcement of garageman's lien is state action because lien enforcement is the function of the sheriff); *Cox Bakeries of North Dakota, Inc., v. Timm Moving & Storage, Inc.,* 554 F.2d 356, 358 (8th Cir. 1977) (Mr. Justice Clark) ("[T]he state has delegated the traditional roles of judge, jury and sheriff to [the warehouseman] without providing for any judicial supervision or other safeguards."); *Hall v. Garson,* 430 F.2d 430, 439 (5th Cir. 1970) ("[T]he execution of a lien

*The defendants and the Attorney General have appealed the judgment of the Appellate Division in *Sharrock* to the New York Court of Appeals. As of the date of the submission of this brief, the briefs of all the parties in *Sharrock* have been filed in the Court of Appeals and counsel are awaiting a date for argument. In view of the importance which should be given to the determination of a State's highest court as to whether a particular function constitutes a public function, it is respectfully suggested that if there is any question whether the enforcement of a possessory lien is a public function in New York, this Court should defer decision in the instant case until a decision is rendered by the New York State Court of Appeals in *Sharrock.*

. . . has in Texas traditionally been the function of the Sheriff or constable."); *Johnson v. Riverside Hotel Inc.,* 399 F.Supp. 1138, 1140 (S.D.Fla. 1975) ("The execution of the Landlord's lien in Florida was traditionally a function of the Sheriff."); *Caesar v. Kiser,* 387 F.Supp. 645, 647 (M.D.N.C. 1975) (". . . the traditional governmental function of lien enforcement."); *Adams v. Department of Motor Vehicles,* 113 Cal.Rptr. 145, 11 Cal.3d 146, 520 P.2d 961, 965, 64 A.L.R.3d 803 (Cal.Sup.Ct. 1974) ("The State delegated . . . the traditional governmental function of lien enforcement."). In *Parks v. "Mr. Ford", supra* at 141, the Third Circuit Court of Appeals determined that

> "[b]y thus authorizing sales to take place, directing how they are to be carried out, and giving them the effect of judicial sales, Pennsylvania has quite literally delegated to private individuals powers 'traditionally exclusively reserved' to sheriffs and constables. In our view, that grant of power has the same effect for state action purposes as if Pennsylvania had endowed private individuals with the same authority to arrest suspects and to execute warrants as state and local police possess."

The contested statute authorizes warehousemen to perform the precise function that the sheriff performed at common law. Under the common law, a bailee was given "a possessory lien . . . for the value of his services" and permitted to "retain the chattel in his possession until the same be paid." Brown, *Personal Property,* §13.1, p.394 (3d edition 1975). The bailee, however, had "no right to sell the subject matter of the lien to reimburse himself for his debt unless such right [was] conferred expressly by statute or by special agreement between him and his debtor." *Id.* at §13.1, p.394; §13.1, p.390; §14.1, pp.446-447. *Accord, Hall, Possessory Liens in English Law,* p.67 (1917); Jones, *A Treatise on The*

Laws of Liens, §10, pp.1033-1034 (1888); Overton, *Treatise on the Law of Liens,* §14, p.10 (1883); 78 Am.Jur.2d *Warehousemen,* §122, p.260; 35 *N.Y.Jurisprudence, Liens,* §44, pp.234-235; ***Knapp Street and Co. v. McCaffrey,*** 177 U.S. 638, 645 (1900); *United States v. Toys of the World Club,* 288 F.2d 89, 95 (2d Cir. 1961).* "A warehouseman's lien, like other common-law liens, confers no right to sell the property to which the lien attaches, but only a right to hold it till the charges are paid." 2 L. Jones, *A Treatise on the Law of Liens,* §976, pp. 990-991 (3d edition 1914).

Under the common law, a bailee with a possessory lien who sought to enforce his claim resorted to the "expedient of suing his debtor for the amount of the claim, and levying execution or attachment on the bailed goods." Brown, *Personal Property,* §121, pp. 602-603 (2d edition 1955); D. Overton, *A Treatise on the Law of Liens,* §14.1, p. 10 n. 1 (1883); Cowen, *Treatise,* P. 227 n. 6 (4th Edition 1858) 62 N.Y. Jurisprudence, *Warehouse Receipts,* §125, p. 747, n. 2; *Parks v. "Mr. Ford",* *supra* at 157 (Gibbons, J., concurring); *State v. Amarillo Transfer & Storage Co.,* 94 S.W.2d 590, 592 (Tex. Civ. App. 1936); *Jewett v. City Transfer and Storage Co.,* 128 Cal. App. 556, 18 P.2d 351 (1933); *Stewart v. Naud,*

*The enforcement of possessory liens is thus sharply distinguishable from the common law right of repossession enjoyed by secured parties. "Probably the chief obstacle to concluding that self-help repossession involves a traditional state function is the fact . . . that in one form or another the common law very early recognized repossession as a private remedy." *Gibbs v. Titelman,* 502 F. 2d 1107, 1114 (3d Cir.), *cert. denied,* 419 U. S. 1039 (1974). Accord, *Turner v. Impala Motors,* 503 F. 2d 607, 612 (6th Cir. 1974); *Adams v. Southern California First National Bank,* 492 F. 2d 324, 336 (9th Cir. 1973), *cert. denied,* 419 U. S. 1006 (1974). Similarly, the power to sell pledged property is distinguishable in that it derives from an "inherent or implied term of the contract." 13 Carmody-Wait 2d, *Encyclopedia of New York Practice,* §84:101, p. 223. See also, Brown, *Personal Property,* §15.1, pp. 469-470 (3d edition 1975).

125 Cal. 596, 58 Pac. 186 (1889).* In authorizing warehousemen to sell an owner's goods, section 7-210 thus authorizes warehousemen to perform the precise function that at common law had been the function of the sheriff. *See also Cox Bakeries v. Tim Moving and Storage, supra* at 358-359 ("The foreclosure of the lien was conducted by the sheriff under the supervision of the court."); *Mason v. Garris,* 360 F.Supp. 420, 422-423 (N.D. Ga. 1973) (three-judge court) (state statute authorized marshal to enforce garageman's lien).**

The power delegated by the State in section 7-210 obviates the necessity for a warehouseman to bring an action on his claim, obtain a judgment, and have the sheriff enforce that judgment, *Parks v. "Mr. Ford", supra* at 146-147 (Adams, J., concurring), or to bring a judicial foreclosure proceeding and obtain an order of sale. 2 L.

*Under the common law, to execute a money judgment, the court issued a writ of *fieri facias* to the sheriff which commanded "that he cause to be made of the goods and chattels of the defendant the sum or debt recovered." Blackstone, *Commentaries on the Laws of England,* Book III, §543, p. 2033 (Jones edition); Plucknett, *A Concise History of the Common Law,* p. 390 (5th edition 1956). See also, Westminister II, c. 18, p. 1285. "The writ of *fieri facias* is of great antiquity. . . . It is the writ most commonly resorted to. . . . The common law principles of the writ prevail generally, with modification, in the United States." Blackstone, *Commentaries of the Laws of England, supra,* at §543, p. 2033, n. 2.

**Sheriffs and constables also normally enforce landlord lien under distress for rent statutes. These statutes uniformly have been held unconstitutional by the federal district court. *Stroemer v. Shevin,* 399 F. Supp. 993 (S.D. Fla. 1973) (three-judge court); *Ragin v. Schwartz,* 393 F. Supp. 152 (W.D. Pa. 1975); *Adams v. Joseph F. Sanson Investment Co.,* 376 F. Supp. 61 (D. Nev. 1974); *Sheffer v. Holbrook,* 346 F. Supp. 762 (S.D. W. Va. 1972) (three-judge court); *Holt v. Brown,* 336 F. Supp. 2 (W.D. Ky. 1971) (three-judge court); *Santiago v. McElroy,* 319 F. Supp. 284 (E.D. Pa. 1970) (three-judge court).

Jones, *A Treatise on the Law of Liens*, §1038, pp. 1046-1047 (3d edition). *See, e.g., N.Y. Lien Law*, §206. The contested statute authorizes warehousemen to determine whether and how much the owner owes for transportation and storage costs, and to enforce this decision by selling the bailed goods. The State has thus delegated to warehousemen a portion of "the State's monopoly over techniques for binding conflict resolution." *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (Harlan, J.). *Accord, Parks v. "Mr. Ford", supra* at 146 (Adams, J., concurring) ("[c]onflict resolution is now seen as one of the core attributes of the sovereign."); *Cox Bakeries of North Dakota, Inc., v. Timm Moving & Storage, Inc., supra* at 358 (". . . the traditional roles of judge, jury and sheriff. . . ."); *Shirley v. State National Bank of Conencticut*, 493 F.2d 739, 747 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (Kaufman, J., dissenting); *Bond v. Dentzer*, 494 F.2d 302, 312 (2d Cir.), *cert.denied*, 419 U.S. 837 (1974) (Kaufman, J., dissenting). *See also, United States v. Kras*, 409 U.S. 434, 454-455 (1973) (Stewart, J., dissenting).

Defendant Flagg contends that dispute resolution is not a governmental function because the private sector often resolves disputes by such means as arbitration and voluntary settlement. (Brief for Petitioners Flagg Brothers, Inc. and Henry Flagg, p.29). Historically, it is of course true that parties have resolved disputes voluntarily through such methods as abitration, accord and satisfaction and settlement. Blackstone's *Commentaries on the Laws of England*, Bk. III §§24 *et seq.* (Jones edition). Parties may also by contract provide security for debts and agree that, in the event of default, the security may be sold. See, *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); see also, N.Y. Uniform Commercial Code §§9-102(a), 104(c), 204(1). The function

delegated by the State in the instant case, however, is not simply dispute resolution, but final, non-consensual dispute resolution, which is enforced by the forced and final sale of another person's property through the device of lien enforcement. A person whose goods are sold pursuant to section 7-210 stands in the position of a defendant in a judicial action who has had a judgment entered against him, and whose property has been sold by the sheriff in satisfaction of the judgment.

The difference between consensual and non-consensual dispute resolution is crucial. Compare, *Boddie v. Connecticut, supra*, with *United States v. Kras, supra.* As Judge Kaufman has concluded:

> "[T]he decisive difference between 'binding conflict resolution', on the one hand, and 'private structuring . . . and repair,' on the other, is the element of voluntary *mutual* consent, the presence of which permits the latter just as its absence requires the former. Accordingly where, as here, the creditor is empowered, whether by common law or by statute, to unilaterally resolve a conflict, he is acting within a sphere reserved for the state alone and, therefore, his power, like state power, must be fettered by the restraints of due process." *Shirley v. State National Bank of Connecticut*, 493 F.2d at 747 (Judge Kaufman, dissenting) (emphasis in original).

The Uniform Commercial Code provides that a "warehouseman is liable for damages" which result from his failure to comply with the procedures set forth in section 7-210 "and in case of willful violation is liable for conversion." *N.Y. Uniform Commercial Code*, §7-210(9).*

*In *Fuentes v. Shevin, supra*, at 83 n-13, this court noted that there was a "substantial possibility" that "uneducated, uninformed consumer[s] with little access to legal help and little familiarity with legal procedures" will not bring actions to test the validity of the creditor's sale.

This does not, however, detract from the fact that a sale of goods pursuant to section 7-210 constitutes final, non-consensual, binding dispute resolution with respect to the title of the goods sold. *See N.Y. Uniform Commercial Code,* §7-210(5), which protects good faith purchasers of goods sold to enforce a warehouseman's lien, despite the warehouseman's non-compliance with section 7-210. The power to determine finally the ownership rights in a chattel, "because of the drastic consequences, is necessarily an attribute of sovereignty." *See Parks v. "Mr. Ford", supra* at 164 n.2 (Hunter, J., concurring).

As the court below recognized, the power to sell another's property is "a truly extraordinary remedy." (173a). While the Attorney General contends that the right to dispose of property "is one of the essential incidents of property", Brief of Petitioner Lefkowitz, p.13, the incident of property is the right to alienate one's own property, not the property owned by another. While the warehouseman claims a possessory lien, it is at best a limited interest based on a disputed and unresolved claim for transportation and storage fees. In contrast, there is no question that the bailor is the owner of the goods. Brown, *Personal Property,* §107, p.505 (2d edition 1955); *Hernandez v. European Auto Collision,* 487 F.2d 378, 385 (2d Cir. 1973) (Timbers, J., concurring).

One of the great and essential functions of government is the protection of property rights by the judicial resolution of disputes. "The great and chief end, therefore, of men's uniting unto commonwealths, and putting themselves under government is the preservation of property, to which in the state of nature there are many things wanting." Locke, *Of Civil Government, Second Essay,* Ch. IX, §124 (Gateway). *See also Federalist Paper,* No.10 p.79; No.17, p.120 (Mentor edition); Blackstone, *Commentaries on the*

Laws of England, supra at Book II, §5 p. 1490 n.2. According to Blackstone, self help at common law was limited to self defense, recaption, re-entry on land, abatement of nuisances, distress, and the seizing of heriots. Blackstone, *Commentaries on the Laws of England, supra* at Book III, §§7-11,23. "The landlord-tenant relationship was one of the few areas where the right of self-help was recognized by the common law of most States, and the implementation of this right has been fraught with 'violence and quarrels and bloodshed.'" *Lindsey v. Normet,* 405 U.S. 56, 71 (1972). In our system of law, non-consequental dispute resolution by the courts is the norm and self-help the extremely limited exception. Pollack and Maitland, 2 *History of English Law,* Ch.IX, §2, pp. 574-575; Holdsworth, 3 *History of English Law,* Ch.II, p. 278; *Gibbs v. Titelman,* 369 F. Supp, 38, 45-47 (E.D. Pa. 1973), *rev'd,* 502 F.2d 1107 (3d Cir), cert denied, 419 U.S. 1039 (1974).*

It is one of the constitutional assumptions that the power of involuntary sale of property is limited to specific exercises of *governmental* power, such as the power of eminent domain, the enforcement of judgment liens, and the judicial foreclosure of mortgages. A state delegation of the power of the non-consensual sale of property, without providing the owner of the property with any procedural safeguards, is repugnant to the most basic notions of sovereignty, *Parks v. "Mr. Ford", supra* at 164

*"A political society, in the first place, puts this rude self-help under stringent regulation, and second, provides a substitute for it in the shape of judicial process. Self-help is indeed but an unsatisfactory means of redress. Its possibility depends upon the injured party being stronger than the wrongdoer, a state of things which is by no means a matter of course, and the party is made judge in his own cause, often at a time when he is least likely to form an impartial opinion upon its merits." Blackstone, *Commentaries on the Laws of England, supra,* at Book III, §5, pp. 1490-1491, n. 2 (Hammond), citing Pollock and Maitland, 2 *Hist. Eng. Law* (2d ed.), 574; 3 Holdsworth, *Hist. Eng. Law,* 243 ff.

n.2 (Hunter, J., concurring), and frustrates the very values which the Due Process Clause seeks to protect. *Washington v. Roberge,* 278 U.S. 116 (1928); *Eubanks v. Richmond,* 226 U.S. 137 (1912). *Cf. Eastlake v. Forest City Enterprises Inc.,* 96 S.Ct. 2358 (1976), *distinguishing Washington* and *Eubanks.*

This enormous power of sale delegated to warehousemen is far from, as defendants suggest, consumer oriented legislation. Compare, *Bond v. Dentzer, supra.* The statutory power of sale is not a substitute for other creditor remedies, but is "in addition to all other rights allowed by law to a creditor against his debtor." *N.Y. Uniform Commercial Code,* §7-210(7).* Absent section 7-210, no such power of sale would exist, and any sale by the warehouseman would render him liable for damages in conversion. Brown, *Personal Property,* §14.1, p. 446 (3d edition 1975).

Warehousemen obtained the power of summary sale in large part because they have "constituted, and still constitute special interest groups to which the state legislatures are traditionally responsive." Brown, *Personal Property,* §13.1, p. 391 (3d edition 1975).** The present

*Defendant Flagg Brothers is thus in error in suggesting at page 27 of its brief that a warehouseman may not obtain a deficiency judgment following sale. See 13 Carmody-Wait 2d, §§ 84:95, 84:104.n.10. In addition, the fact that the warehouseman has complete discretion as to whether to sell makes his remedy of sale broader than that of U.C.C. Article 9 creditor who must sell if the debtor has paid 60 percent of the cash price of loan. *N. Y. Uniform Commercial Code,* §9-505(1).

**No special duties were imposed upon the warehousemen in exchange for the power of sale. Unlike common carriers, warehousemen need not accept all customers. In addition, warehousemen are "only bound to ordinary care and diligence in the care and protection of the property entrusted to them." D. Overton, *A. Treatise on the Law of Liens,* §222, p. 256 (1883); *N. Y. Uniform Commercial Code,* §7-204.

power of sale stands in contrast to that earlier granted by some states which authorized the sale "only after a hearing in court and an order by the judge. . . ." Comment, *Liens—Extent to which Common-Law Artisan's Lien Has Been Supplanted by Statute,* 37 Mich.L.Rev. 273, 274 (1938). See description of statutes of Georgia, Kentucky, Maine, Massachusetts, Michigan, North Dakota, Rhode Island, South Dakota and Tennessee in 2 L. Jones, *A Treatise on the Law of Liens,* §§1052, 1053, 1054a, 1055, 1056, 1056a, 1059a, 1059b, 1060 (3d ed. 1914). In addition, "several of the statutes required a justice of the peace or sheriff to inventory the goods and conduct the sale." Brief of Petitioners American Warehousemen's Association and the International Association of Refrigerated Warehouses, p. 12; Brown, *Personal Property,* §119, p. 590 (2d edition 1955).

A statute which grants a class of creditors the power to summarily sell another person's goods in order to satisfy a disputed claim, without the necessity of instituting an action and proving the validity of the claim, and without even affording the owner of the goods an opportunity for a hearing, can hardly be said to be consumer oriented.*

The warehouseman's foreclosure of his lien is the functional equivalent of the ministerial functions performed by the clerks and sheriffs in *Sniadach, Fuentes and North Georgia Finishing. Parks v. "Mr. Ford",* 556 F.2d 132, 148 (3d Cir. 1977) (Adams, J., concurring); *Hall v. Garson,* 430 F.2d 430, 440 (5th Cir. 1970). *See McMeans v.*

*The statement in *Hackett v. Nelson Express and Storage Co.,* 162 Misc. 144, 294 N. Y. S. 905, 909 (Sup. Ct. 1937), that the statute "seeks to protect the person storing the goods" refers to the requirement of notice and advertisement which precedes the sale. The court did not state that the involuntary final sale of a person's goods is beneficial to the owner of the goods.

Schwartz, 330 F.Supp. 1397, 1399 (S.D. Ala. 1971) ("Federal jurisdiction should not depend on who served the writ of garnishment in the state court—the sheriff or the creditor's lawyer.")* This is made clear by Mr. Justice Stewart's description in *Fuentes v. Shevin, supra* of the state's role in the issuance of a writ of replevin:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." *Fuentes v. Shevin,* 407 U.S. 67, 93 (1972).

This description is fully applicable to the State's delegation to the warehouseman of the power to enforce his lien.

The critical question is not whether a state intends to circumvent constitutional guarantees by delegating its functions to private parties, but whether the function delegated is governmental in nature. A finding of no state action in the instant case may serve as a clear message to state legislatures that they will be able to insulate a variety of creditor remedies from the due process protections established by this Court in *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing,* by simply eliminating the ministerial functions of clerks or other officials.

*A finding of no state action in the instant case would create an ironic situation: "Those creditors who do resort to some form of judicial process are simultaneously found to have invoked state action because they used state officials—a court clerk and sheriff typically—and to have violated due process because they have not done enough. Meanwhile, creditors who resort to no judicial process whatsoever, and more flagrantly violate individual rights, are insulated from judicial review because no state action is found." Comment, ***State Action: A Pathology and a Proposed Cure,*** 64 Cal. L. Rev. 146, 176-177 (1976); McCall, ***Due Process and Consumer Protection Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues,*** 26 Hast. L. J. 383, 404 (1974).

It is thus clear that the State has delegated the public functions of non-consensual dispute resolution and lien enforcement to warehousemen. The warehouseman's power of sale is "so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966).

The State is also significantly involved in the contested activity because section 7-210 delegates to warehousemen an extraordinary power which they would not otherwise have, and authorizes them to engage in acts which the state could not itself engage in consistent with the Fourteenth Amendment. Moreover, by authorizing the summary sale of goods, section 7-210 has granted warehousemen a power which, from their standpoint, is an economically and strategically attractive alternative to either commencing an action for monetary damages, proving a claim and obtaining and enforcing a judgment, or obtaining judicial foreclosure on the lien, *N.Y.Lien Law,* §206, *et.seq.* New York has thereby "significantly encourag[ed]" the contested activity. *Reitman v. Mulkey,* 387 U.S. 369, 381 (1967); *Robinson v. Florida,* 378 U.S. 153 (1964); Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 Va.L.Rev. 355, 382 (1973).

Although the bailee's possessory lien has ancient roots dating back to the fifteenth century, *United States v. Toys of the World Club,* 288 F.2d 89, 94 (2d Cir. 1961) (Friendly, J.); 2 L. Jones, *The Law of Liens,* §731 (3d edition, 1914), the power to enforce this lien by summary sale did not come into existence until the enactment of statutes like the predecessors to section 7-210. The common law possessory lien is "merely a device to coerce the debtor into payment of his debts by the retention of his property from him until he pays. A sale by a lienor in attempted foreclosure of his lien is indeed, as to the owner of the goods, a conversion." Brown, *Personal Property,* §14.1, p.446 (3d edition 1975). In addition, in the instant case there is no contractual power of sale.* But for the contested statute, a warehouseman who sold a bailor's goods would be a converter and judicially decreed a forced purchaser. Prosser, *Law of Torts,* §15, pp.80-81, 87 (4th edition 1971). When a warehouseman sells goods to enforce his possessory lien, he is acting pursuant to, under, and only under color of section 7-210.

Defendants contend that a state command is necessary to find state action. This Court's decisions, however, show that state action is present where the statutory authorization constitutes the sole basis of authority for an act which, if performed by the state, would violate the Fourteenth Amendment. *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Evans v. Newton,* 382 U.S. 296, 305-311 (1966) (White, J., concurring); *Burton v. Wilmington Parkway Authority,* 365 U.S. 715, 726 (1961) (Stewart, J., concurring); *id.* at 727 (Frankfurter, J., dissenting); *id.* at 728 (Harlan and Whittaker, J.J., dissenting); *Railway Employees Dep't v. Hanson,* 351 U.S. 225 (1956); *Public Utilities Commission*

*This case is thus unlike a pledge or secured transaction where the right to retake or sell the collateral is conferred by contract. See Brown, *Personal Property,* §15.1, pp. 469-470 (3d edition 1975).

v. Pollak, 343 U.S. 451 (1952); *Nixon v. Condon,* 286 U.S. 73, 85 (1932); *McCabe v. Atchison,* 235 U.S. 151 (1914). *See also, CBS v. Democratic National Committee,* 412 U.S. 94, 178-180 (1973) (Brennan, and Marshall, J.J., dissenting); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 202-203 (1970) (Brennan, J., concurring in part and dissenting in part).

In the *Civil Rights Cases,* 109 U.S. 3 (1883), this court stressed the fact that the Fourteenth Amendment was designed to provide protection against unconstitutional state legislation. The Fourteenth Amendment "nullifies and makes void *all State legislation,* and State action of every kind" which conflicts with the Privileges and Immunities, Due Process and Equal Protection Clauses. *The Civil Rights Cases, supra* at 11 (emphasis added). "[T]he prohibitions of the amendment are against State laws and acts done under State authority." *Id.* at 13. "[T]he mischief and wrong which the amendment was intended to provide against . . . is State laws, *or* State action of some kind adverse to the rights of the citizen secured by the amendment." *Id.* at 13. The wrong must be "sanctioned in some way by the State", or "done under state authority." *Id.* at 17. The wrong must rest "upon some State law or State authority for its excuse and perpetration." *Id.* at 18.*

*This is consistent with the language of the Fourteenth Amendment itself. The Amendment begins: "no state shall *make or enforce any law. . . .*" This language directly precedes the Privileges and Immunities Clause. The language preceding the Due Process Clause—"*nor* shall any state deprive any person . . ."—does not indicate a more restrictive scope of protection against state action than is provided by the Privileges and Immunities Clause. The use of the word "nor" indicates that the same state action requirement applies to both clauses. This Court in *The Civil Rights Cases* indicated that the same state action requirement applies to both clauses. *The Civil Rights Cases, supra* at 11.

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), four Justices agreed that specific statutory authorization for the contested discrimination by itself constituted state action. Mr. Justice Stewart, concurring, stated that "[t]he highest Court of Delaware has . . . construed this legislative enactment as authorizing discriminatory classifications based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment." *Burton v. Wilmington Parking Authority, supra* at 726-729. Justice Stewart found that the specific statutory authorization granting the restauranteur the power to deny service to blacks constituted significant state action.

Justices Harlan, Whittaker and Frankfurter agreed that if the state statute had been construed by the highest court in Delaware to specifically authorize the discriminatory conduct, this would clearly support a finding of state action. Mr. Justice Harlan, in an opiinon joined by Mr. Justice Whittaker, stated that if the statute were so construed, he "would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment." *Id.* at 729. (Harlan and Whittaker, JJ., dissenting). Mr. Justice Frankfurter agreed that if Justice Stewart was "correct in so reading the decision of the Delaware Supreme Court, his conclusion [regarding state action] inevitably follows." *Id.* at 730 (Frankfurter, J., dissenting).*

*Justices Harlan and Frankfurter dissented only because they concluded that the construction given to the statute by the Delaware Supreme Court was unclear, and that the action should be remanded to that Court for clarification of the meaning of the statute.

In *McCabe v. Atchison,* 235 U.S. 151, 162 (1914), this Court stated that if an individual is discriminated against on the basis of race "by a common carrier, acting in the matter under the authority of a state law . . . he may properly complain that his constitutional privilege has been invaded." While the case was resolved on procedural grounds, not one Justice expressed disagreement with this language in the Court's decision. Moreover, this Court in *Reitman v. Mulkey* explained the decision in *McCabe* as "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." *Id.* at 379.

In *Evans v. Newton,* 382 U.S. 296 (1966), Mr. Justice White concluded that specific statutory authorization to engage in conduct offensive to the Fourteenth Amendment constitutes state action particularly where, as in the instant case, the statute "depart[s] from a policy of strict neutrality" by reversing the common law, and constitutes the sole basis of authority to perform other an unlawful act. *Id.* at 305-307 (White, J., concurring). Similarly, in *Nixon v. Condon,* 286 U.S. 73, 85 (1932), the Court found that the state's statutory conferral of a power which that the state itself could not itself constitutionally exercise under the Fourteenth Amendment is highly significant for state action purposes. "If the state had not conferred it, there would be hardly color of right to give basis for its exercise." In *Reitman v. Mulkey,* 387 U.S. 369 (1967), this Court made it clear that state action was found in *Nixon v. Condon, supra* because a state statute conferred on the committee "authority which the committee otherwise might not have had," even though the statute contained "no directions with respect to the exercise of that power." *Reitman v. Mulkey, supra* at 379. The exercise of the power in *Nixon* was considered to be "an expressed of state au-

thority contrary to the Fourteenth Amendment." *Reitman v. Mulkey, supra* at 379. And, in *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 (1952), this Court held that the Commission's approval of the contested activity, by simply dismissing an investigation to determine its legality, was sufficient to constitute government action.

This Court's decision in *Moose Lodge No. 107, v. Irvis,* 407 U.S. 163 (1972) makes it clear that a state command that the private party perform a particular act is not a prerequisite for a finding of state action. In *Moose Lodge,* this Court held that the Liquor Control Board's regulation, which required licensed clubs to "adhere to all of the provisions of its Constitution and By-Laws", constituted state action because its effect was "to place state sanctions behind [the club's] discriminatory membership rules. . . ." *Id.* at 177-178. State action was found even though the Board's regulation was "neutral" and did not require the club to adopt or enforce any particular regulation. The initiative for any particular regulation or policy came solely from the private club and not from the Board, and the Board did not take any view of what regulations or policy the club should adopt. In this sense, the state's involvement in the instant case is more significant than in *Moose Lodge.* While the Board in *Moose Lodge* did not set forth its policy with respect to discriminatory practices, but simply required the club to enforce whatever policy it chose to adopt, New York, in authorizing the summary sale of goods by warehousemen, has expressly sanctioned and approved the particular conduct that plaintiffs challenge.

Defendant Flagg's reliance on *Evans v. Abney,* 396 U.S. 435 (1970) is misplaced. Most of that opinion does not deal with state action, but is premised on the fact that the decision of the Georgia Supreme Court, pursuant

to which the property reverted to the testator's heirs, constituted state judicial action that did not violate the Equal Protection Clause. That part of the Court's decision which holds that the making of the will did not constitute state action is based on the fact that the testator had made it clear that he had not relied upon the Georgia trust statute:

> "Nor is there any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes. (citation omitted). On the contrary, the language of the Senator's will shows that the racial restrictions were solely the product of the testator's own full blown social philosophy." *Evans v. Abney, supra* at 445.

In the instant case, since a sale of goods by the warehousemen would, absent statutory authority, be an unlawful act, there is no question that warehousemen "act with the knowledge of and pursuant to that statute." *Adickes v. S.H. Kress and Co., supra* at 162 n. 23. Compare *Lucas v. Wisconsin Electric Power Co.,* 466 F.2d 638, 656 (7th Cir. 1972) *(en banc), cert. denied,* 409 U.S. 1114 (1973), where the court stated that a "different question" would have been presented had the utility terminated service pursuant to statutory authority.

In *Jackson v. Metropolitan Edison, Co., supra,* this Court held that Metropolitan Edison's termination of utility service did not constitute state action because Pennsylvania was not involved or concerned with the contested activity. Pennsylvania had not delegated a governmental function and had not specifically authorized or encouraged the summary termination of utility service. The "initiative" for the utility shut-off policy came from the utility company which had filed its tariff with the Com-

mission. The Commission did not act on this tariff. It had "never been the subject of a hearing or other scrutiny by the Commission." *Jackson v. Metropolitan Edison Co., supra* at 354. Moreover, it was "less than clear under state law that Metropolitan was even required to file this provision [providing for utility shut offs] or that the Commission would have had the power to disapprove it." *Id.* at 355. In addition, the utility had the right to terminate service at common law. *Id.* at 354 n. 11.

Here, by contrast, there is a direct nexus between the State conduct and the contested activity. New York, unlike Pennsylvania, has by statute expressly delegated governmental power to the private sector. The New York legislature, unlike the totally passive non-involvement of the Public Service Commission in *Jackson,* took the initiative by enacting the contested statute. In so doing, it specifically authorized warehousemen to summarily sell a bailor's goods. This power, unlike the power to terminate utility service in Pennsylvania, did not exist at common law. Thus, unlike *Jackson,* the State has placed its "imprimatur" on the contested conduct. *Jackson v. Metropolitan Edison Co., supra* at 357.

New York has specifically delegated to warehousemen the power to summarily sell another's property—an act which if performed by the State would violate the Fourteenth Amendment's command that the state not deprive a person of property without due process of law. *North Georgia Finishing Inc., v. Di Chem Inc., supra; Mitchell v. W.T. Grant Co., supra; Fuentes v. Shevin, supra; Sniadach v. Family Finance Corp., supra.* This Court's decisions support the conclusion that this specific statutory authorization and encouragement constitute state action.

Moreover, New York has delegated to warehousemen the governmental functions of lien enforcement and non-consensual, final dispute resolution. This delegation of public power clearly constitutes state action.

A finding of state action will allow the courts to balance the competing interests to determine the procedure required by the Due Process Clause. It will not deprive the warehouseman of his lien or of the means to enforce it. It will only insure that an owner of property will be afforded some opportunity to be heard before his goods are sold.

Conclusion.

For the foregoing reasons, the judgment of the court below should in all respects be affirmed.

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White Plains, New York.

Respectfully submitted,

WESTCHESTER LEGAL SERVICES, Inc.
Martin A. Schwartz, Lawrence S. Kahn,
Attorneys for Respondents,
171 East Post Road,
White Plains, N. Y. 10601
(914) 949-4797.